

In The Matter Of:

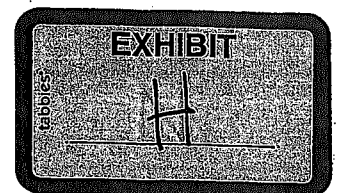
*ARY Jewelers, LLC v.
IBJTC Business Credit Corp., et al.*

*David Molinaro
Vol. 1, December 1, 2004*

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[1] there likely have been some type of documentation
 [2] indicating or evidencing his involvement?
 [3] A: There wouldn't have to be.
 [4] Q: There may or may not, okay.
 [5] We had discussion of — and I appreciate
 [6] it — the one deposition that you've been involved
 [7] in prior to this morning; is that correct?
 [8] A: Correct.
 [9] Q: I hope not, and I mean that, but I will
 [10] ask, have you ever been involved as a party in any
 [11] other lawsuits?
 [12] A: Not that I'm aware of.
 [13] Q: Let me ask you, Mr. Molinaro, what
 [14] documents, and I use that in just about the broadest
 [15] sense, and I mean agreements, papers, photographs,
 [16] videos, E-mails, anything that you can review, what
 [17] documents, what have you reviewed or viewed in
 [18] preparation for your deposition this morning?
 [19] A: Mr. Fischler showed me a bunch of
 [20] documents, and I'm sure I could point them out if I
 [21] was showed them again.
 [22] Q: Let me ask you this. Give me a general
 [23] description. What do you remember of those
 [24] documents?

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[1] A: One was the lawsuit.
 [2] Q: Let me ask you, had you seen that before?
 [3] A: Yes, I'm sure I have.
 [4] Q: Let me back up and ask you, and then I will
 [5] let you finish the answer. When are you talking
 [6] about reviewing these documents that we're
 [7] discussing now? Was it this morning, yesterday,
 [8] last week, months ago?
 [9] A: I think over the course of my involvement
 [10] with my attorney.
 [11] Q: Okay, at different times?
 [12] MR. FISCHLER: Maybe to cut through this
 [13] because of the limited time we have with two
 [14] witnesses today, he has not seen anything that
 [15] hasn't been produced to you.
 [16] MR. CARRIGAN: That cuts through very
 [17] little, but thank you.
 [18] Q: Let me go back. Over this period of time,
 [19] what documents do you remember reviewing? You
 [20] mentioned the lawsuit.
 [21] A: An approval memo, IBJ term sheet, newspaper
 [22] articles, and some other stuff that I can't think of
 [23] off the top of my head.
 [24] Q: When was the last time that you reviewed

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[1] any documents?
 [2] A: I believe Monday.
 [3] Q: What documents do you recall reviewing on
 [4] Monday?
 [5] A: The ones that I previously listed.
 [6] Q: The ones you specifically remember
 [7] reviewing on Monday were the IBJ term sheet, an
 [8] approval memo, newspaper articles, the lawsuit. Is
 [9] there anything else?
 [10] A: My affidavit.
 [11] Q: Do you remember what your affidavit was
 [12] attached to or the purpose of your affidavit?
 [13] A: Yes.
 [14] Q: What was it?
 [15] A: I believe the purpose was with respect to
 [16] venue.
 [17] Q: Anything else you recollect on Monday
 [18] reviewing, seeing, listening to, anything of that
 [19] nature?
 [20] A: I believe term sheets from Foothill.
 [21] Q: Anything else?
 [22] A: I don't recall any specifically.
 [23] Q: Monday, where were you when this review
 [24] took place?

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[1] A: In this boardroom.
 [2] Q: About how long were you in these offices or
 [3] this boardroom on Monday?
 [4] A: An hour and a half or so.
 [5] Q: The term sheets from Foothill, had you ever
 [6] seen those documents, those term sheets prior to
 [7] Monday?
 [8] A: Yes.
 [9] Q: Had you ever seen those term sheets or
 [10] documents at any time that you can recollect prior
 [11] to the commencement of this lawsuit?
 [12] A: No.
 [13] Q: When did you first go to work for the
 [14] Whitehall entity?
 [15] A: I believe it was around March 2000.
 [16] Q: What would that position or entry position
 [17] or title have been?
 [18] A: I believe my title was vice president.
 [19] Q: Sometimes I see vice president kind of
 [20] accompanied by VP such and such. Did you have such
 [21] a title, or was it basic vice president?
 [22] A: I don't recall.
 [23] Q: When did you leave Whitehall?
 [24] A: I believe it was February 2002.

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my understanding that our credit facility was a better credit facility than the one originally proposed by Foothill.

Q: Are you saying at the time you faxed it, you knew that Foothill had proposed a credit facility?

A: I don't know the answer to that.

Q: Sir, you just testified under oath that you were told by Frank O'Connor that they were awaiting, they being ARY, were awaiting your letter of commitment because your credit facility was better than Foothill's; didn't you just testify to that under oath?

A: I did say that.

Q: That means you and Frank O'Connor were aware at the time that, in fact, it was not only out of the range of impossible, not only within the range of possible, you and Frank O'Connor knew at the time you faxed this that they had an outstanding loan proposal, didn't you, sir?

MR. FISCHLER: I'll object to the form.

A: It was my understanding from Frank O'Connor that they elected to go with our term sheet.

Q: As opposed to Foothill's; is that correct,

Q: It certainly was within the realm of possibilities that that proposal was still on the table, correct, sir?

A: Anything is in the realm of possibilities.

Q: That specifically is in the realm of possibilities, correct?

A: I don't know that I can answer that specifically.

Q: Did you have any information that you can recollect when you faxed these articles to Foothill that told you that the loan, their previous loan proposal, which you were aware of, had been withdrawn?

A: I don't remember.

Q: You can't think of anything that would have told you that, correct, sir?

A: I don't believe so.

Q: You knew as you faxed this to Foothill, that you, being Whitehall, was either getting ready to reject this loan proposal or had already done it, correct?

A: I believe we had rejected it at that point in time.

Q: So you knew that a fallback, since you were

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11 sir?

A: In the beginning of the process.

Q: Again, the truth of the matter is that when you faxed this to Foothill, you and Frank O'Connor knew that Foothill had made a loan proposal to ARY to finance their purchase of Krigel's or their involvement with Krigel's on the go-forward, correct, sir?

MR. FISCHLER: Objection to form. You can answer.

A: At a point in time, they had made a proposal.

Q: Did you know what the status of the proposal was when you faxed this?

A: I was told by Frank O'Connor that our proposal was selected.

Q: Did you know the status of Foothill's proposal at the time you faxed these articles to them?

MR. FISCHLER: Objection to form. I thought he just answered that. Go ahead.

MR. CARRIGAN: I'll object to that comment.

You know all you can do is say, "Objection, form."

A: I don't know for certain.

withdrawing or had withdrawn yours, might certainly have been the Foothill proposal, correct?

A: I don't know what the other drawbacks would have been.

Q: Did you think about it at all?

A: I was following the instruction of my supervisor.

Q: Did you think about it at all, sir, or did you just blindly follow the instructions of your supervisor?

MR. FISCHLER: Objection to the form.

A: As a, you know, subordinate to my supervisor, I followed his instructions.

Q: And didn't think about either what Foothill might have on the table with ARY or the consequences of faxing that to them; you didn't think about that, did you, sir?

MR. FISCHLER: Objection to the form.

A: I don't believe I did.

Q: Did you ever even think about whether or not the actions you were taking based on the instructions to you were perhaps inappropriate or in violation of confidentiality provisions or laws or privacy laws or banking rules and regulations? Did

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Q: Just answer this question.

MR. CARRIGAN: I didn't ask for a break. I want this question answered.

MR. FISCHLER: This is the last question. Answer the question, and then we're breaking.

Q: Why would you seek counsel if this situation ever came up again?

A: Because of this situation that we're in right now.

MR. FISCHLER: I think we should break. (Recessed for lunch at 1:32 p.m.)

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[1] forwarding or faxing of those news articles was
[2] either appropriate or inappropriate on any basis,
[3] again, no opinion then, and you are not here
[4] expressing an opinion one way or the other?

[5] A: Correct.

[6] Q: Just so I understand and the ladies and
[7] gentlemen of the jury understand, you are not here
[8] saying that there was nothing wrong with that.

[9] Again, you don't know yourself, and therefore, you
[10] don't have an opinion, and you are not expressing an
[11] opinion?

[12] A: Correct.

[13] Q: That is also true as to whether or not
[14] those types of actions — strike that — the faxing
[15] of these news articles was in violation of any
[16] policies and procedures in place or banking codes or
[17] rules and regulations or privacy laws or
[18] confidentiality agreements or provisions. Again,
[19] you didn't know the answer then, and you don't know
[20] the answer now, and you are not expressing opinions
[21] one way or the other, correct?

[22] A: Correct.

[23] Q: With that, let me see if I can go through
[24] as quickly as possible the kind of detail you've

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[1] AFTERNOON SESSION (2:24 p.m.)

[2] DAVID MOLINARIO, Resumed

[3] BY MR. CARRIGAN:

[4] Q: Mr. Molinario, I have a better
[5] understanding as to your role at least in the
[6] forwarding or faxing of the news articles from
[7] Whitehall to Foothill, and let me just kind of
[8] summarize what took me a while to get to.

[9] As I understand it, this action, being the
[10] faxing of these news articles, was not an, if you
[11] will, independent action on your part, but rather
[12] you were following instructions that had been
[13] specifically given to you by your supervisor,
[14] superior at the time, Mr. Frank O'Connor; is that
[15] correct?

[16] A: That's correct.

[17] Q: You did not at that time, and perhaps
[18] appropriately so, question the advisability or
[19] appropriateness of his instructions. You did, I
[20] imagine as most would, you followed the instructions
[21] you had been given by your boss; is that fair?

[22] A: That is correct.

[23] Q: I take it that you didn't then, nor do you
[24] have now, an opinion as to whether or not the

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[1] been giving me, Mr. Molinario, which I appreciate.

[2] I'm looking for the list of people that you
[3] had some conversations with. I think since this
[4] lawsuit, Frank O'Connor was one, and that is an
[5] individual who is, once again, working with you at
[6] the same place, being Wells Fargo, and he's not in
[7] the same division or group as you are?

[8] A: Frank is in the same division and group. I
[9] don't report into Frank per se.

[10] Q: Thank you for that clarification. Tell me
[11] what conversations you have had with Mr. O'Connor
[12] pertaining to the lawsuit.

[13] A: Frank is the one with that informed me of
[14] the lawsuit. I believe that day or shortly
[15] thereafter, he gave me his recollection of the
[16] accounts as to how it happened.

[17] Q: On the day he informed you of the lawsuit?

[18] A: Yes.

[19] Q: What is your recollection of his
[20] recollection of the events?

[21] A: Frank told me that his recollection was we
[22] got some negative background searches. He spoke to
[23] the people at ARY and told them we were
[24] uncomfortable moving forward. The people at ARY

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[1] you would be correct. Could you possibly rephrase
 [2] that so I can properly answer the question.
 [3] Q: You actually already answered it. You
 [4] already told me you would have expected, based on
 [5] your nine years of experience, that due diligence
 [6] would require doing something by way of looking into
 [7] allegations made in some news related article
 [8] against an individual or a company a number of years
 [9] ago, correct? You already told me that, right?
 [10] MR. FISCHLER: Objection to the form.
 [11] A: I believe that is a correct statement.
 [12] Q: I'm not saying on all four points, but if
 [13] someone did a Google search and saw David Molinaro
 [14] was sued in a lawsuit in Federal Court in Boston and
 [15] was a defendant and some jerky lawyer from Texas
 [16] came up and, you know, tried to pound on him for
 [17] about five or six hours in a deposition and jump to
 [18] the conclusion based on that alone that David
 [19] Molinaro was a bad guy or a crook or had done
 [20] anything wrong whatsoever, that would not either be
 [21] due diligence or the correct assumption, correct?
 [22] MR. FISCHLER: Objection to the form.
 [23] A: I believe based on your hypothetical of a
 [24] factual example, that some people may consider that

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[1] sufficient due diligence and some wouldn't.
 [2] Q: You wouldn't, would you, sir?
 [3] MR. FISCHLER: Objection.
 [4] A: I don't believe I would.
 [5] Q: Especially when it's you that they are
 [6] allegedly or supposedly doing the due diligence on,
 [7] correct?
 [8] A: Yes.
 [9] Q: I hope someone publishes the fact that I'm
 [10] going to recommend to my client that you be released
 [11] from this lawsuit after this deposition and that
 [12] Google erases any trace of your name as a defendant.
 [13] We will deal with that later.
 [14] Quickly, let's talk about the other people
 [15] you mentioned. Brian Kennedy, is he at Wells Fargo?
 [16] A: He's at Webster Retail Finance.
 [17] Q: What do you recollect Brian Kennedy said
 [18] about these events, circumstances or the lawsuit?
 [19] A: Can we go off the record for a quick
 [20] second.
 [21] Q: Sure.
 [22] (Witness and counsel exit to confer)
 [23] Q: Just tell me what Brian Kennedy or what you
 [24] recollect Brian Kennedy told you in conversations

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[1] postlawsuit.
 [2] A: Upon my knowledge of the lawsuit, I
 [3] contacted Brian Kennedy. Brian told me that they
 [4] had already been subpoenaed for their information
 [5] and that he spoke about this situation with Craig
 [6] Thayer, who is their in-house counsel, and he
 [7] confirmed that he remembered Frank asking me and he,
 [8] because he was in the room at the time, to, you
 [9] know, call up Foothill and inform them of what we
 [10] uncovered.
 [11] Q: Do you recall, did Brian Kennedy or whether
 [12] or not Brian Kennedy recollected that he also
 [13] instructed you to fax the articles?
 [14] A: I don't know. I don't believe I asked him
 [15] that.
 [16] Q: Anything else you recall either asking or
 [17] being told from or by Brian Kennedy?
 [18] A: Only one other thing.
 [19] Q: What was that?
 [20] A: Probably three or four months ago after I
 [21] was informed about the deposition, you know, and the
 [22] continuing proceedings, I gave him a courtesy call
 [23] to tell him he may be involved in this just because
 [24] I thought he may.

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[1] Q: Was it an actual conversation or you just
 [2] left a message?
 [3] A: I think we spoke.
 [4] Q: What was his response?
 [5] A: Slightly las-au-fair, "I'll do whatever I
 [6] need to do."
 [7] Q: Again, in the conversations, no notes, no
 [8] memos, no tape recordings, no nothing documenting
 [9] what was the discussed?
 [10] A: No, but do I remember two things now that I
 [11] didn't include.
 [12] Q: Please.
 [13] A: One was that Brian told me that he actually
 [14] went out there to meet with people at Krigel's/ARY,
 [15] and I'm not sure which one, but he actually
 [16] physically went to Missouri.
 [17] Q: Post obtaining this information?
 [18] A: Pre obtaining the information. During the
 [19] initial due diligence, as I mentioned to before.
 [20] The second one was I believe Brian told me
 [21] that it was his recollection that it may have been
 [22] HillCo Capital declined doing this deal for ARY
 [23] because of some other information that they had
 [24] received.